



Respondent appeals from a Preliminary Order which requires respondent to pay temporary total disability benefits and provide medical treatment, including psychiatric treatment at the direction of Herbert C. Modlin, M.D. In its application for review respondent states the issues on appeal as follows:

- (1) Whether claimant has the right to re-open medical and seek temporary total disability payments following a pre-hearing settlement conference held pursuant to K.S.A. 44-523 where stipulations were taken that claimant had reached maximum medical recovery and no additional medical or weeks of temporary total disability compensation were claimed.
- (2) Whether claimant's alleged psychological problems arose out of and in the course of his employment with respondent.
- (3) Whether respondent has the legal right to designate a treating physician to provide medical treatment for claimant's alleged psychological problems or whether the administrative law judge has the legal right to let claimant pick his own doctor for such psychiatric treatment following pre-hearing settlement conference.
- (4) Whether the administrative law judge has authority to order respondent to pay claimant temporary total disability payments at a preliminary hearing following stipulations at a pre-hearing settlement conference previously held in the case that claimant was not seeking any additional weeks of TTD and desired no additional medical treatment.
- (5) Whether the administrative law judge has authority to order respondent to pay TTD to claimant at a preliminary hearing which followed a pre-hearing settlement conference requested by claimant when the testimony showed that claimant received unemployment compensation and he had applied for work with numerous employers.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and consideration of the arguments of the parties the Appeals Board finds, for the reasons stated below, the decision of the Administrative Law Judge should be affirmed.

On appeals from preliminary orders the jurisdiction of the Appeals Board is limited to consideration of appeals which allege that the Administrative Law Judge has exceeded his or her jurisdiction. K.S.A. 44-551. Issues which are jurisdictional and subject to review as a part of the appeal from preliminary orders include notice, timely written claim, accidental injury, whether claimant's injury arose out and in the course of employment and certain other defenses. K.S.A 44-534a.

In arguments listed as one and four above, respondent contends that the Administrative Law Judge has exceeded his jurisdiction by awarding medical and temporary total after stipulations at a pre-trial settlement conference. Respondent indicates claimant stipulated that he was not seeking additional medical treatment or

temporary total disability benefits. The parties thereafter were unable to agree on a functional rating and claimant was referred by the Administrative Law Judge for an independent medical evaluation. The physician who performed the independent medical examination recommended psychiatric treatment. Respondent points out that the issue of need for psychiatric care was known prior to the stipulations. Similar recommendations had been made by other treating physicians. Respondent contends that claimant should, therefore, be bound to the stipulation.

The Appeals Board holds that an Administrative Law Judge may permit a party to withdraw a pre-trial stipulation. K.A.R. 51-3-8. The Administrative Law Judge's order for additional care and medical care and temporary total in effect grants that permission and does not exceed the jurisdiction of the Administrative Law Judge.

Respondent next argues that the Administrative Law Judge erred in concluding that the claimant's psychological problems arose out of and in the course of employment with the respondent. The Appeals Board has previously held and does here again find that the decision regarding whether psychological problems are traceable to an on the job injury is not one of the jurisdictional issues subject to review on appeals from preliminary orders. See, Cunningham v. Michael E. Michael, D.D.S., Docket No. 177,523 (April 1994). The requirement for compensability of psychological problems is that they be traceable to an on the job injury. This is one step removed from the determination of whether there was an accidental injury arising out of and in the course of employment.

Respondent next argues that the Administrative Law Judge does not have the right to designate the treating psychiatrist. The Appeals Board has previously held that where the request for medical treatment is made and none is provided the Administrative Law Judge may as a part of the preliminary hearing order designate the treating physician. To do so does not exceed his or her jurisdiction. See Cook v. TCI, Docket No. 183,789 (March 1994).

Finally, the respondent argues that the Administrative Law Judge does not have authority to order temporary total disability benefits where it is shown that the claimant has received unemployment benefits and has applied for work with numerous employers. Such evidence is obviously inconsistent with the assertion that the claimant is temporarily totally disability. It does not, however, establish in all cases that the claimant is not temporarily totally disabled. An order for temporary total benefits, even in light of such testimony, does not exceed the jurisdiction of the administrative law judge and accordingly is not subject to review on appeal.

At oral argument, respondent added an issue relating to the evidence considered by the Administrative Law Judge. Respondent contends it was improper for the Administrative Law Judge to consider a report from Dr. Modlin which was not submitted until after the hearing. Apparently the report was expected to be received by FAX on the day of the preliminary hearing but was not in fact received until approximately five days later. Respondent's challenge to the decision to consider this report is again not one which goes to the jurisdiction to the Administrative Law Judge. On appeal from preliminary hearing the issue is not subject to review.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the decision of Administrative Law Judge Alvin E. Witwer, dated July 26, 1994, should remain in full force and effect.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October, 1994.

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BOARD MEMBER

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